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No. 93-377

In The

Supreme Court Of The United States

October Term, 1993

DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK, *et al.*,
Petitioner

against

MILHELM ATTEA & BROS., INC., *et al.*,
Respondent

On Writ Of Certiorari To The Court Of Appeals Of The State Of New York

Amicus Curiae Brief Of The State Of Connecticut In Support Of Petitioners New York Department Of Taxation And Finance, Commissioner Of Taxation And Finance, And Tax Appeals Tribunal Of The State Of New York.

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QUESTION PRESENTED

Whether, in order to prevent the avoidance of tax by non-Indian purchasers of cigarettes from Indian retailers, the State of New York may require the retailers' cigarette suppliers to comply with regulations limiting the quantity of tax exempt cigarettes which can be purchased for resale at reservation outlets to an amount no greater than the maximum legitimate Indian consumption of the reservation, and imposing upon the suppliers minimal burdens relating to record keeping and reporting.

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INTEREST OF THE AMICUS CURIAE

Amicus State of Connecticut by Richard Blumenthal, its Attorney General, and pursuant to Supreme Court Rule 37.5, as a state having within its borders Indian tribes and reservation lands, has an interest in the outcome of the legal issues presented by Petitioners in seeking reversal of the decision of the State of New York's Court of Appeals in this proceeding. The State of Connecticut has by statute recognized the existence of five Indian tribes. The government of the United States has recognized only one of them. The remaining four have not been recognized by treaty, statute, or act of the executive branch through the Department of the Interior's Bureau of Indian Affairs.

The decision of this Court may directly affect only the understanding of the reach of the federal Indian trader statutes regarding state taxing authority over Indian tribes with whom the federal government has formal and explicit dealings. Because there are four tribes which are not federally recognized in Connecticut, Connecticut asks this Court to clarify that the federal Indian trader statutes and this Court's decision in this case, do not apply to tribes without federal recognition.

In addition, the regulatory issues arising from the legal controversy presented by the Petitioners directly affect the ability of states to ensure that tax exemptions

of whatever legal source that apply to federally recognized Indian tribes are not applied beyond their intended scope. Because of the importance of a state's ability to regulate meaningfully in areas which the federal government has not chosen to preempt, the State of Connecticut supports the general view of other amici states that the decision below must be reversed.

INTRODUCTION AND SUMMARY OF ARGUMENT

A. Introduction:

The relation of state jurisdiction to the plenary power of the Congress to legislate on behalf of those tribes of Indians with which it has entered into a trust relationship, and to the Indian tribes themselves and their lands, is a complex legal inquiry.

The Indian nations for the most part once resided somewhere beyond the farthest reaches of settlement at the time when Congress first enacted a series of trade and intercourse acts in furtherance of its constitutional prerogatives.[1/] The once clear lines demarcating notions of virtually absolute Indian sovereignty with respect to the jurisdiction of the several states have evolved over time and in response to specific circumstances. As Justice Frankfurter wrote in

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1/ U.S. Const. art. I, § 8, cl. 3, authorizes Congress "to regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes." The first trade and intercourse act passed by the Congress was that of July 22, 1790. 1 Stat. 137.

the case *Organized Village of Kake v. Egan*,[2/] "[t]he relation between the Indians and the States has by no means remained constant since the days of John Marshall."

One of the changed circumstances, in the modern era, as newly-founded states surrounded the Indian country, has been the increased frequency of contacts between Indians and non-Indians, and the concomitant legitimacy of state interests in regulating the affairs of non-Indians in those contacts. And in respect to such regulation, the taxing power of the State has very often been the agency of control. Nearly a century ago, the ability of a territorial government to tax the personalty of non-Indians within Indian country was tested in this Court.[3/] The analysis of the issue at that time centered upon whether the assertion of state jurisdiction was so proximate and direct as to be in effect the equivalent of a levy upon either the lands or privileges of the Indians themselves. The modern cases turn upon principles of federal preemption especially

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2/ 369 U.S. 61, 71 (1962).

3/ *Thomas v. Gay*, 165 U.S. 264 (1898) (tax on personalty imposed by territorial government of Oklahoma upon cattle which were grazed by non-Indians on the Osage Indian reservation); *see also Catholic Missions v. Missoula County*, 200 U.S. 118 (1906) (tax liability of personalty of non-Indian missionaries on reservation lands).

adapted to federal Indian law,[4/] but continue to address the same core issue respecting the *extent* and not *whether* state jurisdiction may extend to matters involving the on-reservation activities of non-Indians.

Finally, it cannot be emphasized too strongly that the context in which federal preemptive principles operate in this area is solely in respect to those Indian tribes for which the federal government affirmatively has chosen to exercise its plenary constitutional authority. Federal recognition of Indian tribes and the government-to-government relationship arising therefrom is the backdrop against which the prior taxing cases of this Court have been decided.[5/] The instant case is important because it tests the allowable extent of the state taxing authority over certain activities of Indian traders and non-Indians. The question whether and to what extent that authority may reach tribal entities having a relationship with the state but not with the federal government is a collateral issue in this case, but one of signal importance to states like Connecticut,

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4/ *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980) ("The unique historical origins of tribal sovereignty make it generally unhelpful to apply to federal enactments regulating Indian tribes those standards of preemption that have emerged in other areas of the law.")

5/ Most of those cases involved state efforts to tax Indians on tribal reservations. *See McClanahan v. Arizona State Tax Commission*, 411 U.S. 164, 165 n.1 (1973); *see also Oklahoma Tax Commission v. Sac and Fox Nation*, ___ U.S. ___, 113 S.Ct. 1985 (1993).

which hosts both tribal categories, federally recognized and not, within its borders.

B. Summary of Argument:

1. Indian trader statutes are restricted to activities conducted by Indian traders with the permission of the federal government within Indian country upon reservations created by treaty or some other expression of the federal government such as statute or executive order. Accordingly, state cigarette sales regulation outside of Indian country or in relation to Indians otherwise unrecognized by the federal government is presumptively valid.

2. The general preemptive effect of the Indian trader statutes, 25 U.S.C. § 261 *et seq.*, is not controlling in the specific area of state cigarette tax regulation of on-reservation sales. *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980); *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976).

3. Other precedent of this Court in the tax field confirms that a particularized examination of relevant state, tribal and federal interests must be undertaken prior to making any determination of the preemptive effect of the Indian Trader statutes upon state on-reservation cigarette sales tax regulation.

ARGUMENT

I. Neither The Existence Nor The Administration Of The Indian Trader Statutes Preempts State Jurisdiction Over Transactions Involving Indians And Non-Indians When Indian Country Or Federally Supervised Reservations Are Not Involved.

A. A legal distinction exists between Indian tribes recognized by the Federal Government and those not so recognized.

The instant case is presented in a fashion which presumes that the tax regulations of New York's Department of Taxation and Finance impinge upon federal prerogatives with respect to relations with all the Indian tribes in New York; hence, the focus in the case throughout has been upon federal preemption generally and the operation of the Indian trader statutes in particular. Indeed, the regulations at issue embrace all nine tribal groups extant in New York. *See* 20 N.Y.C.R.R. § 335.6(b)(2); Pet. App. at A63.[6/]

Two of these New York tribes are not federally recognized. That is, there exists no acknowledgment by

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6/ "(2) *Exempt Indian nation or tribe* for the purpose of this section means one of the following New York State Indian nations or tribes: Cayuga, Oneida Indian Nation, Onondage Nation of Indians, Poospatuck, St. Regis Mohawk, Seneca Nation of Indians, Shinnecock, Tonawanda Band of Senecas and Tuscarora Nation of Indians."

the federal government of any special relationship between it and the tribes in question.[7/] Such a determination is, in the ordinary course, made by the executive branch of the government, and specifically by the Bureau of Indian Affairs within the Department of Interior. *See* 25 C.F.R. Part 83; *see also United States v. Sandoval*, 231 U.S. 28, 46-47 (1913); *La Pier*, 986 F.2d at 305; *United States v. Cook*, 922 F.2d 1026, 1031 (2d Cir.), cert. denied, 111 S.Ct. 2235 (1991). This distinction is of no immediate consequence if this Court concludes that the New York regulations do *not* impinge upon an area where federal interests and legislation leave no room for assertions of any state jurisdiction. Clearly, if these regulations pose no significant regulatory burden upon Respondents as federally licensed Indian traders in their dealings with and on any federally recognized Indian reservation or lands, they pose no burden at all from the standpoint of preemption analysis in dealing with Indians or with reservations not subject to federal supervision. *Cf. LaPier*, 986 F.2d at 305-306, *quoting United States v. Heath*, 509 F.2d 16, 19 (9th Cir. 1974) (member of tribe unrecognized by federal government is outside federal

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7/ The two tribes, the Poospatuck and Shinnecock, are not on the comprehensive list of Indian tribes prepared by the federal Bureau of Indian Affairs and published most recently in 1988 at 53 Fed. Reg. 52,829 (1988) and updated. 25 C.F.R. Part 83. *See LaPier v. McCormick*, 986 F.2d 303, 305 (9th Cir. 1993); *see generally United States v. John*, 437 U.S. 634 (1978).

criminal jurisdiction in Indian Country, 18 U.S.C. § 1153, just as member of "terminated tribe" no longer considered an "Indian" for the purposes of the exercise of federal criminal jurisdiction). But if this Court determines that the Court of Appeals is correct in its reading of the preemptive effect of the Indian trader statues, then the result should be limited to those geographical areas where Indian traders carry out their licensed activities, that is, in "Indian country." Either outcome needs clarification concerning the relevance of federal recognition to the present controversy.

Connecticut is sensitive to the reach of the term "Indian country" or references to "reservation Indians,"[8/]

8/ The Court in *McClanahan* stated that its use of the term "reservation Indians," *see Williams v. Lee*, 358 U.S. 217, 220, (1959), was in recognition of the fact that, although the Congress most often legislates on Indian matters dealing with Indian tribes as "collective entities," these entities were comprised of individuals, and that such legislation confers rights upon individuals. *McClanahan*, 411 U.S. 164 at 181. Thus, the term "reservation Indians" as employed in this and other decisions of this Court, *see e.g. Warren Trading Post v. Tax Commission*, 380 U.S. 685, 691-92 (1965), is firmly within the ambit of federal and not state Indian laws. In *Williams*, the term "reservation Indians" is discussed with reference to Chief Justice Marshall's opinion in *Worcester v. Georgia*, 6 Pet. 515 (1832), in which he described Indian nations as "distinct political communities, having territorial boundaries, ... which is not only acknowledged, but guarantied by the United States." *Worcester*, 6 Pet. 515 at 557. Therefore, Indians residing upon reservations not supervised by the United States are not "reservation Indians" as that term has been utilized in the decisions of this Court.

because only one of five indigenous Connecticut tribes has been recognized by the federal government. *See* 25 U.S.C. §§ 1751-1760 (Mashantucket Pequot Indian Land Claims Settlement) and § 1758 (extension of federal recognition); Conn. Gen. Stat. § 47-59a(b). The remaining four tribal groups are "state-recognized" only,[9/] and three of them have reservation lands identified by state statute. Conn. Gen. Stat. § 47-63.

In applying these principles, Connecticut must distinguish between the effect of its revenue laws[10/] upon tribal groups recognized and not recognized by the federal government. Only in the former case would preemption analysis be available, and not in the latter.

B. The Indian trader statutes apply exclusively to licensing by the Commissioner of Indian Affairs within "Indian country," or upon federal "Indian reservations."

The Indian trader statutes, 25 U.S.C. § 261 *et seq.*, assign to the federal Commissioner of Indian Affairs "the sole power and authority to appoint traders to the Indian tribes ...." 25 U.S.C. § 261. Permission from the commissioner is required of anyone "desiring

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9/ Section 47-66h(b) of Connecticut's General Statutes states that nothing in the state law chapter dealing with Indians "shall be construed to confer tribal status under federal law on the indigenous tribes named in section 47-59a ...."

10/ Connecticut revenue laws include the regulation of cigarette sales. *See* Conn. Gen. Stat. § 12-285 *et seq.*

to trade with the Indians on any Indian reservation ...." 25 U.S.C. § 262; *see Williams v. Lee*, 358 U.S. 217 at 218. The President of the United States is authorized to proscribe trade or the introduction of goods "into the country belonging to any Indian tribe ...." 25 U.S.C. § 263. Trading without a license by any non-Indian residing "in the Indian country, or on any Indian reservation as a trader ..." is subject to the assessment of a penalty. 25 U.S.C. § 264; *see Central Machinery Co. v. Arizona Tax Commission*, 448 U.S. 160, 163 (1980); *White Mountain Apache*, 448 U.S. 136 at 152; *Warren Trading Post*, 380 U.S. 685 at 688-90. The close regulation of Indian trading is designed by the federal government to be protective of the Indians. 25 U.S.C. § 262; *Central Machinery*, 448 U.S. at 165; *Warren Trading Post*, 380 U.S. at 691. Protection was afforded by limiting the contacts of non-Indians with the tribes, something only possible when the federal government had undertaken supervision of the lands upon which the Indians were located.

The term "reservation" in the Indian trader statutes refers to Indian reservations belonging to federally recognized tribes enjoying the special status afforded them under federal law.[11/] In *Central*

11/ *See Morton v. Mancari*, 417 U.S. 535, 551 (1974), speaking of "the unique legal status of Indian tribes under federal laws and upon the plenary power of Congress, based on a history

(footnote cont'd)

Machinery, this Court began its discussion by noting that the Gila River Farms Indian Tribe "is federally recognized and is governed by a constitution adopted pursuant to the Indian Reorganization Act [and] ... conducts farming operations on tribal and individual trust land within the Gila River Reservation, which was established in Arizona by the Act of Feb. 28, 1859, ch. 66, 11 Stat. 333, 401." *Central Machinery*, 448 U.S. at 161.

Although historically an Indian "reservation" might not have been synonymous with the term Indian country as employed in the earliest pronouncements of the Congress, *United States v. Celestine*, 215 U.S. 278, 284-87 (1909), nevertheless, the present statutory definition of Indian country, 18 U.S.C. § 1151,[12/] is inclusive. *DeCoteau*, 42 U.S. 425 at 427; *see also United States v. McGowan*, 302 U.S. 535, 538-39 (1938); *United States v. Pelican*, 232 U.S. 442, 449 (1914); *United States v. Sandoval*, 231 U.S. 28 at 37, 37n. and 46; *Donnelly v.*

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of treaties and the assumption of a 'guardian-ward' status, to legislate on behalf of federally recognized Indian tribes." *See also Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 764-65 (1985).

12/ The statute defines the federal government's criminal jurisdiction over Indians. The decisional law has made the definition applicable to discussions of the reach of state civil jurisdiction over federally recognized Indian reservations. *DeCoteau v. District County Court*, 420 U.S. 425, 427 n.2 (1975).

United States, 228 U.S. 243, 269 (1913).[13/] This Court has continued to construe that definition broadly. *Oklahoma Tax Commission*, 113 S.Ct. at 1991. Therefore, the terms "reservation" and "Indian country" are bound up with each other and with the Indian trader statutes in a context that is exclusively federal in character.[14/]

C. Preemption analysis in federal Indian law necessitates consideration of the geographical factor.

Federal Indian law is largely territorial in nature. Thus, the discussion of state, tribal and federal interests in the context of state assertions of authority has always considered the geographical nexus posed by the existence of terms like "Indian country," since these terms arise exclusively out of Congress' plenary power to regulate affairs with Indian tribes and the tribes' status as a "separate people with their own political institutions." *See Morton v. Mancari*, 417 U.S. 535; *United States v. Antelope*, 430 U.S. 641, 646 (1977). In

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13/ *Cf. United States v. Martin*, 14 F. 817, 822-23 (1883) ("Ever since the phrase "Indian Country" found its way into the federal legislation, it has been used to signify not only a place or tract of country actually occupied by Indians, but also a tract so occupied by the, and set apart or designated as exclusively for their use, under and by the authority of the United States.")

14/ *See e.g. United States v. Forty-eight Pounds of Rising Star Tea*, 38 F. 400, 401 (C.C.N.D. Cal. 1889), *construing* R.S. § 2133 (25 U.S.C. § 264).

White Mountain Apache, this Court has remarked that "there is a significant geographical component to tribal sovereignty, a component which remains highly relevant to the preemption inquiry; though the reservation boundary is not absolute, it remains an important factor to weigh in determining whether state authority has exceeded the permissible limits." *White Mountain Apache*, 448 U.S. 136 at 151 and at 143, *citing Moe*, 425 U.S. 463 at 475. This factor, as well as canons of construction unique to preemption analysis and favorable to the tribes, *see McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 at 174-75, relate solely to the assertion of jurisdiction by a state on the one hand, and federally recognized tribes and the federal government on the other. In cases where no similar conflict arises the geographical factor is not a bar to state jurisdiction. *See McGowan*, 302 U.S. 535 at 539.[15/]

Different considerations apply to tribal groups outside the recognition of the federal government and, hence, outside Indian country by definition, or outside the scope of the term "reservation Indians," in the usage of this Court. These entities are fully within state

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15/ "The mere fact that the locus of an event is on an Indian reservation does not prevent the exercise of state jurisdiction where the parties involved are not Indians and the subject matter of the transaction is not of federal concern." F. Cohen, *Handbook of Federal Indian Law*, 121 (1st ed. 1942).

jurisdiction, notwithstanding the fact that their members may be Indians in an anthropological or ethnohistorical sense. *LaPier*, 986 F.2d 303 at 306; *Heath*, 509 F.2d 16 at 19; *see also Sandoval*, 231 U.S. 28. Similarly, the activities of non-reservation Indians or those not dwelling in Indian country have been held by this Court to fall within state jurisdiction. *Organized Village of Kake v. Egan*, 369 U.S. 60 at 62.[16/] Also, the activities of reservation Indians outside of Indian country are largely within the jurisdiction of the states. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973); *Kake*, 369 U.S. 60 at 75.[17/]

16/ *See Oklahoma Tax Commission*, 113 S.Ct. at 1992 (*McClanahan* presumption against state taxing authority applies to all Indian country, and not just formal reservations.") This Court in *McClanahan* described this situation - "the extent of federal pre-emption and residual Indian sovereignty in the total absence of federal treaty obligations or legislation" - as "something of a moot question," "since in almost all cases federal treaties and statutes define the boundaries of federal and state jurisdiction." *McClanahan*, 411 U.S. 164 at 172 n.8. The question may be moot when viewed from the federal perspective, but it is otherwise from the state perspective, when formalized dealings exist or are possible with tribal groups and their lands which are altogether outside the federal sphere.

17/ "State authority over Indians is yet more extensive over activities ... not on any reservation." *Kake*, 369 U.S. at 75. In *Mescalero Apache*, this Court stated that "[a]bsent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to

(footnote cont'd)

Accordingly, since any preemption challenge to New York's cigarette law regulations implicating the Indian trader statutes must be limited to Indian country, or, reservation Indians officially under the supervision of the federal government, the validity of those regulations vis-a-vis any non-recognized tribal groups or reservation lands remains unaffected and presumptively assured. The ability of such states as Connecticut, therefore, to control the commercial activities of non-Indians on the reservation lands of state acknowledged tribes is *a fortiori* not subject to preemption by the Indian trader statutes.

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non-discriminatory state law otherwise applicable to all citizens of the State." 411 U.S. at 148-49 and cases cited. Importantly, the Court in *Mescalero Apache* stated that this principle was "as relevant to a State's tax laws as it is to its criminal laws ...." *Id.* at 149. In *Mescalero Apache* this Court upheld New Mexico's nondiscriminatory gross receipts tax as applied to an off-reservation ski resort operated by the Mescalero Apache Tribe. *See also United States v. Porter*, 22 F.2d 365 (1927) (personalty owned by an Indian and held outside the reservation subject to taxation by the state).

II. Even If Argument Is Restricted To The Application Of The Federal Indian Trader Statutes Within Their Proper Sphere, The Court Of Appeal's Decision Is Flawed By A Superficial Analysis Of The Preemptive Effect Of Those Statutes Upon State Regulation Of Cigarette Sales To Non-Indians On Indian Reservations.

The Court of Appeals conducted a preemption analysis of the validity of the New York cigarette tax regulations in relation to the existence of the federal Indian trader statutes, 25 U.S.C. § 261 *et seq.*, following this Court's remand of this case to New York's Appellate Division "for further consideration in light of *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. [505, 111 S.Ct. 905, 112 L.Ed.2d 1112]." *Milhelm Attea & Bros., Inc. v. Department of Taxation and Finance*, 81 N.Y.2d 417, 599 N.Y.S.2d 510, 615 N.E.2d 994, 996 (1993). The resulting decision misapplies *Potawatomi* and reads overbroadly the preemptive effect of the Indian trader statutes upon the particular object and means of regulation at issue.

The plaintiffs in the *Attea* case argued that New York's cigarette tax regulations[18/] as applied to them were invalid, because they impinged upon an area of the law relegated solely to regulation by the government of

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18/ The mechanics of New York's regulations were summarized by the Court of Appeals in Section I of its opinion. *Attea & Bros.*, 81 N.Y.2d 417, 615 N.E.2d 994 at 995-96.

the United States. For this proposition they raised the federal Indian trader statutes as a bar to state regulation of their cigarette sales on New York's Indian reservations. Significantly, the regulations at issue would not have affected sales by wholesalers of unstamped cigarettes to Indians for consumption by Indians on their reservations. They were designed to effect collection of the excise tax from wholesalers for cigarettes sold on the reservations to non-Indians. Nevertheless, the Court of Appeals agreed that the Indian trader statutes acted as an absolute bar to New York's attempt to prevent the circumvention of the tax by non-Indians who made cigarette purchases from retail outlets located on the reservations.

The Court of Appeals cited this Court's decision in *Warren Trading Post v. Tax Commission,* 380 U.S. 685, as support for its conclusion that the Indian trader statutes and regulations of the Commissioner of Indian Affairs duly promulgated thereunder, 25 C.F.R. § 140, were, in the words of the *Warren Trading Post* court, "all-inclusive" and provided "no room" for the imposition of additional burdens upon such traders by state laws. *Attea & Bros.*, 615 N.E.2d 994 at 996, *quoting Warren Trading Post,* 380 U.S. 685 at 690.

The State of Connecticut agrees with the Petitioners that the Court of Appeals has interpreted overbroadly the preemptive effect of the Indian trader statutes as articulated in *Warren Trading Post*. The position that the New York court has taken assumes

that Indian traders are entirely exempt from state revenue regulation. Not only is that position considerably undercut by the decisions in *Potawatomi, Washington v. Confederated Tribes of Colville Reservation,* 447 U.S. 134 (1980), and *Moe v. Confederated Salish and Kootenai Tribes,* 425 U.S. 463 (1976), for the reasons which the Petitioners have advanced, see Petition for Writ of Certiorari, No. 93-377, at 14-20, but it also does not heed the sound counsel of this Court that in the area of state revenue laws and federal Indian tribes "[g]eneralizations on this subject have become particularly treacherous." *Mescalero Apache Tribe v. Jones,* 411 U.S. 145 at 147. This Court has stated that preemption analysis in the context of legislation affecting federally recognized Indian tribes of its nature has to take into account the "respective rights of States, Indians, and the Federal Government." *Id.* at 148; *see also White Mountain Apache Tribe v. Bracker,* 448 U.S. 136 at 141-143 and cases cited therein.[19/]

19/ This means that the assertion of a state regulatory interest within reservation boundaries is not in and of itself flatly interdicted, *id.* at 141 and n.9, and is, further, subject to "no rigid rule by which to resolve the question whether a particular state law may be applied to an Indian reservation or to tribal members." *Id.* at 142. On the contrary, such assertions are measured against theories of federal preemption or infringement of the rights of reservation Indians to self-rule. *Id., citing Warren Trading Post,* 380 U.S. 685 and *McClanahan,* 411 U.S. 164 (1973), and *Williams,* 358 U.S. 217 (1959).

When the state's regulatory interest involves the on-reservation conduct of Indians, this Court has held state revenue regulation to be preempted. *E.g. McClanahan,* 411 U.S. 164. But when the conduct of non-Indians has been at issue, the analysis has turned upon the competing interests noted above. *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 176 (1989); *Ramah Navajo School Board of New Mexico, Inc. v. Bureau of Revenue*, 458 U.S. 832, 838 (1982); *White Mountain Apache*, 448 U.S. 136 at 145.[20/] Thus, while a state levy on gross proceeds of sale or gross income was held in *Warren Trading Post* to have infringed upon the federal government's comprehensive regulation of commerce with reservation Indians as applied to a licensed non-Indian trader doing business on a federal reservation, a state sales tax upon non-Indian on-reservation purchasers of cigarettes did not so infringe, even when the state regulatory scheme required an Indian retailer to collect the tax. *Moe,* 425 U.S. 463 at 482-83; *Washington v. Confederated Tribes of Colville,* 447 U.S. 134 at 150-62.[21/] In making its

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20/ This Court, in setting out the framework of analysis on this point in *White Mountain Apache*, specifically compared the results obtaining in *Warren Trading Post* with *Moe*. *White Mountain Apache*, 448 U.S. 136 at 145.

21/ The legitimate state interest in preventing the avoidance of the sales tax posed only a minimal burden upon the Indian traders in *Moe*, and *Warren Trading Post* was distinguished

(footnote cont'd)

preemption analysis, this Court in *Colville* took into account the potentially competing regulatory scheme of the Indian trader statutes and concluded that these sought "to regulate businesses *selling goods to reservation Indians* for cash or exchange ... but no similar intent is evident with respect to sales by Indians to *nonmembers of the Tribe.*" *Id.* at 155-56 (emphasis added). Thus, any distinction raised by the Court of Appeals between Indian trader wholesalers and Indian retailers collapses, especially in light of the fact, as Petitioners point out, that the Indian retailers in *Colville* were federally licensed Indian traders. *Confederated Tribes of Colville v. Washington,* 446 F.Supp. 1339, 1347 (E.D. Wash. 1978).

Apart from its analysis of the Indian trader statutes, on no other federal preemptive ground did this Court in *Colville* find the state tax interest inapplicable to the cigarette sales in question.[22/] Furthermore, this

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on this point. *Moe*, 447 U.S. 463 at 482-83. The State of Washington's *amicus* brief aptly discusses how regulations such as New York's represent a considered policy choice to avoid collection mechanisms which generate friction in state-tribal relations by focusing upon suppliers, who are further up the distribution chain from the Indian retailers, and on activities which are off the reservations.

22/ *Colville*, 447 U.S. 134 at 155-56 and 157. This Court determined that the state specifically was not infringing

(footnote cont'd)

Court stated in *Colville* that state seizures of cigarette shipments in-route to the reservation were a proper response to the non-collection of the tax from sales to nonmembers on the reservation notwithstanding the fact that the sales were exempt from the tax in question while in transit. *Colville*, 447 U.S. at 161-62. If the Indian trader wholesalers may legitimately be subjected to such remedies, then the regulatory scheme under which this recourse may be taken has *not* been summarily preempted by federal law. Accordingly, it is not sufficient, as the Court of Appeals has done, to interpose the Indian trader statutes between the New York regulations and their objective without further analysis.

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upon Indian self-rule: "While the tribes do have an interest in raising revenues for essential governmental programs, that interest is strongest when the revenues are derived from value generated on the reservation by activities involving the Tribes and when the taxpayer is the recipient of tribal services. The State also has a legitimate governmental interest in raising revenues, and that interest is likewise strongest when the tax is directed at off-reservation value and when the taxpayer is the recipient of state services." *Id.* at 156-57. What was at stake with respect to cigarette sales to nonmembers of the tribes was the marketability *vel non* of the tribe's own tax exemption to nonmembers. As Petitioners justly emphasize, Petition for Writ of Certiorari at 17, this Court remarked broadly that no principles of federal Indian law made marketable such an exemption "to persons who would normally do their business elsewhere." *Colville*, 447 U.S. 134 at 155.

CONCLUSION

The judgment of the New York Court of Appeals should be reversed.

Dated this 14th day of December, 1993, at Hartford, Connecticut.

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